UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

EVERGLADES COLLEGE, INC.
d/b/a KEISER UNIVERSITY and
EVERGLADES UNIVERSITY

v. **Case No. 12-CA-096026**

LISA K. FIKKI,

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RESPONDENT'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE

In response to the Board's November 29, 2018, Notice to Show Cause and its December 11, 2018, Extension of Time to File Response to Notice To Show Cause, Respondent Everglades College, Inc. d/b/a Keiser University and Everglades University ("Respondent") responds that it does not oppose remand to the Administrative Law Judge ("ALJ") of the issue of whether Respondent's arbitration agreement, which did not expressly restrict employee access to the Board, violated Section 8(a)(1) of the National Labor Relations Act.[1] In light of the decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), Respondent supports remanding this issue to the ALJ for further proceedings including, if necessary, the filing of statements/briefs, reopening the record, and issuance of a supplemental decision.

I. The Board Should Remand This Case

Respondent supports remanding this case to the ALJ. At the time of the Board's decision and Administrative Law Judge Melissa M. Olivero's decision that the Board affirmed, the

[1] Respondent contends that, to the extent Counsel for the Intervenor has addressed claims on their merits in Charging Party Lisa K. Fikki's Statement Opposing Remand, its efforts are misplaced, as such arguments are not appropriate at this time and should be reserved for briefings to the Board or the ALJ within time allowed therefor.

analysis used to determine whether the maintenance of a policy that did not expressly restrict employee access to the Board violated Section 8(a)(1) was based on the framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which dictated that a facially neutral work policy would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." *Id.* at 647. However, the Board has since overruled the test outlined in *Lutheran Heritage* in favor of a new standard that applies retroactively to all pending cases and is set forth in *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

Given the new standard, it is appropriate for administrative law judges to hear the issue and begin the process of developing case law under the *Boeing* standard. Accordingly, this case should be remanded to the ALJ to afford the parties the opportunity to proffer new legal arguments, statements, briefs, and reopen the record, before the ALJ applies this new standard.

II. Any Opposition to Remanding This Case Should be Rejected

Respondent is informed that Counsel for the General Counsel and Counsel for the Intervenor ("Counsels for the Other Parties") will oppose remanding this case to the ALJ based on the belief that pending Board case *Prime Healthcare Paradise Valley, LLC*, 21-CA-133783 presents similar legal issues and that an eventual decision to be made in *Prime Healthcare* should be applied to the instant case. This is not a valid basis to oppose remand in this case.

First, the record and the parties' briefing in this case did not address issues pertinent to the analysis under the new *Boeing* standard. Due process dictates that the parties be able to supplement and augment the record, to the extent necessary, to address issues raised by *Boeing*. Remanding this case affords the parties the opportunity to more fully develop the record with the

new standard in mind and enable the ALJ to assess the instant action with a record and briefing attuned to the *Boeing* standard.

Second, to the extent the Counsels for the Other Parties oppose remand based on *Prime Healthcare*, which is currently pending before the Board, the Counsels for the Other Parties' position is misplaced. *Prime Healthcare* involves different arguments regarding a different arbitration provision with different language. In short, *Prime Healthcare* is different. In *Prime Healthcare*, Counsel for the General Counsel to the Board focuses in a brief on the fact that the arbitration clause at issue in that case states that "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy… The Purpose and effect of this Agreement is to substitute arbitration as the forum for resolution of the Claims…." *Prime Healthcare*, 21-CA-133781, GC Brief on Remand at 12 (filed Aug. 31, 2018). Counsel for the General Counsel concludes its argument by stating that "Because the provision explicitly states that all other forums are displaced by arbitration for all claims, including federal statutory claims, this provision restricts the filing of unfair labor practice charges with the NLRB." *Id.* Notably, no such restriction exists in Respondent's arbitration clause in the instant case.

Accordingly, *Prime Healthcare* will not be the prophetic guiding light that the Counsels for the Other Parties proclaim it to be, and its pending case is not a reason to prevent this case from being remanded to the ALJ. To the contrary, the differences in the clauses support the notion that this case should be remanded, the record reopened, and the parties permitted to submit new statements and briefings applying the new legal standard. Due process requires that

novel issues be addressed on their own merits, and not on the merits of a case bearing a vague resemblance.

Similarly, Counsels for the Other Parties' contention that this case should not be remanded due to the fact that Counsel for the General Counsel opposed a remand in *Private National Mortgage Acceptance Company, LLC*, 20-CA-170020 because the issue in *Private National* "is similar to the issue currently pending before the Board in *Prime Healthcare*, 21-CA-133781, where the General Counsel has already set forth its position on this issue[,]" and "the General Counsel respectfully urges the Board to decide *Prime Healthcare* and then apply the same rationale to decide the instant case" fails for the same reason. *Private National Mortgage Acceptance Company, LLC*, 20-CA-170020 at 2. *Private National* involves different arguments regarding a different arbitration provision with different language to both *Prime Healthcare* and the instant case. As discussed above, these differences support the notion that the case should be remanded, the record reopened, and the parties permitted to submit new statements and briefings applying the new legal standard.

Moreover, Counsel for the General Counsel's actions do not represent the intentions of the Board. The Board did not remand or issue a Notice to Show Cause in *Prime Healthcare*, but did issue a notice to show cause in the later *Private National* case before the Board (as well as in the instant case). The fact that neither case cited by Counsels for the Other Parties has yet been decided and the fact that the Board issued a Notice to Show Cause why the *Private National* case should not be remanded (upon which a ruling has not been made) evidences the fact that the Counsel for the General Counsel's views do not mirror the views of the Board. To the contrary, the Board's Notices to Show Cause in both *Private National* and this case seem to suggest that

the Board sees the need for independent reviews of each case based on their individual merits. Therefore, affording deference to Counsel for the General Counsel's theories as to how the Board should rule in other cases would be unreasonable.

Counsels for the Other Parties' view that the Board should hold in abeyance decisions on other cases to wait for its decision in *Prime Healthcare* should be awarded no deference. As noted above, the language under scrutiny in *Prime Healthcare* is not included anywhere in the arbitration clause at issue in the instant case. An entirely different analysis will be required to make a determination and, therefore, waiting on a decision in *Prime Healthcare* or in *Private National* makes little sense. Accordingly, the Board should remand the case to the ALJ.

Based on the foregoing, Respondent submits that *Prime Healthcare* would not dispose of this case. Accordingly, any opposition by the Counsels for the Other Parties to remanding this case to the ALJ should be rejected on these and all grounds, as failing to show good cause.

Respectfully submitted this 14th day of January, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of January, 2019, I served a true and correct copy by email to the counsel named below, as well as filed the foregoing electronically with the NLRB:

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